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IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 570

BLACK DIAMOND LINES, INC.,
Petitioner
(Respondent-Appellant below),

against

PIONEER IMPORT CORPORATION
(Libelant-Appellee below)

and

TAMPA INTER-OCEAN STEAMSHIP COMPANY
(Claimant-Appellant-Appellee below),
Respondents.

BRIEF OF RESPONDENT, PIONEER IMPORT CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

This cause presents no reason within Rule 38, paragraph 5, for the issuance of a writ of certiorari. Contrary to petitioner's assertions neither the decision of the District Court (R. 918-928) reported in 49 F. Supp. 559 nor that of the Circuit Court of Appeals (R. 976-8), reported in 138 F. (2d) 907, is in conflict with applicable decisions of this Court or with applicable decisions of another Circuit.

No novel questions of federal law were decided below; questions of local law were not involved. The questions raised by the petition are not of general interest or of unusual importance; they have already been answered by this Court in other cases.

By the multitude of reasons put forward for the granting of the writ, petitioner apparently hopes to make up for the lack of merit of any single reason. Actually the case is an ordinary one of damage to cargo caused by negligence of the petitioner and unseaworthiness of the ship. The principal questions are factual, not legal. The courts below, in concurrent findings, resolved these questions of fact against petitioner (R. 928-944, 977). These findings of fact were amply sustained by the evidence and the conclusions of law (R. 944-6, 977-8) inevitably followed under well established principles of admiralty jurisprudence.

The Cause Below

Libelant-respondent was the owner of 1847 cases, and 20 bundles of four cases each, of lily of the valley pips which were in good healthy state when dug and packed in Germany in October-November 1939 (Findings 2 and 6, R. 929). These pips were dormant (Finding 37, R. 938) and arrangements had been made to ship them under refrigeration from Rotterdam to New York on a vessel of the Holland-American Line, but that Line cancelled the booking under threat of a British embargo because of German origin of the shipment (Finding 7, R. 930). There being no refrigerated space available, libelant wished to obtain the next coolest place of stowage—namely on the foredeck of a vessel covered by tarpaulins to protect them from sea water (Opinion, R. 919). It, therefore, booked space for the pips on the forward deck of the *Lafcomo* through petitioner, the charterer-operator of the vessel, and stipulated that they be covered with tarpaulins (Findings 10, 14, 14, R. 930-1). The petitioner accepted the shipment

but failed to cover the pips with tarpaulins since neither it nor the ship had spare tarpaulins available (Findings 18, 19, 20, R. 932-3). The pips were in good order on delivery to the vessel (Finding 16, R. 932).

The pips were stowed by petitioner's stevedores under supervision of the Captain (Finding 23, R. 933) on the deck plating of the foredeck of the ship (Finding 24, R. 934), where they obstructed the run-off of sea water through mooring rings, freeing ports and scuppers in the bulwarks (Findings 28, 29, 30, R. 936-7) rather than on the hatch covers where they would have been above the water on deck and would have allowed the sea to drain off through such openings (Finding 35, R. 938). The ship experienced such weather as was to be expected on an ordinary North Atlantic voyage in November-December with strong westerly winds and fresh gales, resulting in much sea water coming aboard (Finding 33, R. 937) which thoroughly soaked the cases of pips so that their contents were found to be ruined and a total loss commercially on arrival at New York (Findings 38, 47-54 inc., R. 939-943). On the basis of these findings the District Court found that petitioner and the ship's officers were negligent in such stowage of the pips and that the ship was unseaworthy *quoad* such stowage (Conclusions VI, VII, R. 945) and held both petitioner and the shipowner jointly and severally liable to libelant-respondent. It concluded, however, that, as between the shipowner (claimant-respondent) and petitioner the shipowner should recover from petitioner any amount which it might "be required to pay in satisfaction of libelant-respondent's claim herein" (Conclusions IX, X, R. 946) because petitioner had falsely represented to the ship's captain that the pips were not to be covered with tarpaulins (Finding 60, R. 944). The findings of fact of the District Judge fully substantiated his clear and well-reasoned opinion (R. 918-928).

Upon appeal the Circuit Court of Appeals, opinion by Clark, C. J., affirmed the judgment of the District Court

in all respects with costs (R. 976-8) in an opinion from which I quote as follows:

> "The well-reasoned opinion of Leibell, J., below, 49 F. Supp. 559, leaves little for us to add. There is ample evidence to sustain his findings. Upon the finding that there was no agreement by the shipper that the deck cargo need not be covered, the vessel is liable, as well as the common carrier. Salt water is obviously harmful to plant life, and the finding of negligence in stowage was justified. The shipper accepted the risk of losses from carriage on deck only so far as they occurred under proper stowage. See Hough, J., in *The Royal Sceptre*, D. C. S. D. N. Y., 187 F. 224, 228; *Compania de Navigacion La Flecha* v. *Brauer*, 168 U. S. 104, 123, 124, 18 S. Ct. 12, 42 L. Ed. 398. The ship was thus unseaworthy in respect to its carriage. *The J. L. Luckenbach*, 2 Cir., 65 F. 2d 570, 572; *The Thomas P. Beal*, 3 Cir., 11 F. 2d 49. Both respondent and the vessel are therefore liable; the maritime lien against the ship for safe carriage obtains whether or not it was under charter. *The Maggie Hammond*, 9 Wall. 435, 449, 450, 76 U. S. 435, 19 L. Ed. 772; *Taylor Bros. Lumber Co.* v. *Sunset Lighterage Co.*, 2 Cir., 43 F. 2d 700, 701; *The Esrom*, 2 Cir., 272 F. 266, 271, certiorari denied 257 U. S. 634, 42 S. Ct. 47, 66 L. Ed. 408. Libellant was not in fault and there is no basis for application of the rule of divided damages in tort. Respondent has not been able to prove what the damage would have been if proper stowage had been made. See *Schnell* v. *The Vallescura*, 293 U. S. 296, 307, 55 S. Ct. 194, 79 L. Ed. 373. And since, as the court found, libellant's demand for tarpaulin coverage was never withdrawn, the statement of respondent's agents to the 'Lafcomo's' captain to the effect that tarpaulins were not needed was a gross misrepresentation of fact, and respondent should therefore be held for the entire damage as against the claimant. *Canadian Transport Co.* v. *Court Line, Ltd.*, [1940] A. C. 934" (R. 977-8).

Argument

Petitioner puts forward ten alleged reasons for granting the writ (Petition 14-16) and the nine points of its argument (Brief 19-43) follow the same outline. Each Roman numbered point corresponds to the respective Arabic numbered reason except that Point IV covers two reasons (Nos. 4 and 5) as also does Point VIII (reasons Nos. 9 and 10) while Point IX deals with new matter (general interest and unusual importance of questions presented) not dealt with in the reasons assigned in the petition. This results in Points V, VI and VII covering Reasons 6, 7 and 8, respectively.

In answering petitioner's argument I shall follow the condensation made in its nine points. Of these nine points, I, II and III deal solely with the dispute between petitioner and claimant-respondent, the answer to which I leave to counsel for claimant-respondent, limiting my argument to petitioner's Points IV to IX, inclusive.

POINT I

The courts below were clearly right in holding that libelant-respondent did not assume the risk of damage to its cargo through wetting by sea water shipped by the vessel and their decisions are not in conflict with *Lawrence* v. *Minturn* and *The Delaware*.

(Answering Petitioner's Point IV, Brief pp. 31-4.)

Petitioner's position is that libelant-respondent assumed all risk of its deck cargo being wetted by salt water because it agreed to stowage on deck, even though such wetting was due to petitioner's failure to cover the cargo with tarpaulins as it had agreed and to its negligence in stowing the cargo

on the deck plates where it obstructed the openings in the bulwarks, thus causing the water shipped on board to back up and immerse the uncovered cargo, instead of stowing it on the tops of the hatches (3 feet above the deck plates) where the water would have an unimpeded run-off to the sea. To state the position is to refute it. By agreeing to carriage of its cargo on deck libelant-respondent did not relieve petitioner from liability for loss of, or injury to, such cargo caused by petitioner's failure reasonably to protect it from salt water.

Both courts below concurred in finding that petitioner failed to fulfill its agreement to cover the pips with tarpaulins, and that the stowage was negligent and the ship unseaworthy with respect thereto. See Points IV and V, infra, pp. 12-18.

As this Court held in *Compania de Navigacion La Flecha* v. *Brauer*, 168 U. S. 104:

> "The words 'on deck at owner's risk' cannot have been intended by the parties to cover risks from all causes whatsoever, including negligent or wilful acts of the master and crew. To give so broad an interpretation to words of exception, inserted by the carrier and for his benefit, would be contrary to settled rules of construction, and would render nugatory many of the subsequent stipulations of the bill of lading" (pp. 123-4).

And see *The Royal Sceptre*, 187 F. 224, where Judge Hough, a very experienced admiralty judge, held:

> "Deck cargo at shipper's risk does not mean such absolute surrender of all rights. The risk assumed presupposes proper loading for deck stowage and a seaworthy ship. It is not thought that Lawrence v. Minturn asserts any doctrine opposed to this" (p. 228).

The Circuit Court of Appeals below, citing these decisions, affirmed the conclusion of the District Court that the

"shipped on deck at shipper's risk" provision in the bill of lading did not relieve the carrier or ship "for improper care and stowage" (Conclusion IV, R. 945), holding that:

> "The shipper accepted the risk of losses from carriage on deck only so far as they occurred under proper stowage" (R. 977).

The decisions cited by petitioner are not to the contrary. In the *Carriso* (C. C. A. 9) 30 F. (2d) 279, the contention was that stowage on deck constituted negligence *per se*, and not that "the consignments here were improperly loaded or stowed" (p. 280).

In *Lawrence* v. *Minturn*, 17 How. 100, the Court expressly found that the stowage was good, saying:

> "As to the argument, that there was negligence in not properly stowing and supporting this burden on deck, we think it is not made out in proof. The master is bound to use due diligence and skill in stowing and staying the cargo; but there is no absolute warranty that what is done shall prove sufficient. We are of opinion that due diligence and skill were used" (p. 115).

Petitioner at the bottom of page 33 of its brief gives an entirely wrong impression of the holding of this Court in *The Delaware*, 14 Wall. 579, by quoting only a part of the last sentence and indicating the omission by asterisks. The complete sentence, emphasizing the words omitted by petitioner, reads as follows:

> "No such consequences, however, follow if the goods were stowed on deck by the consent of the shipper, as in that event neither the master nor the owner is liable for any damage done to the goods by the perils of the sea or from the necessary exposure of the property, *but the burden to prove such consent is upon the carrier, and he must take care that he has competent evidence to prove the fact*" (p. 605).

In the court below the petitioner failed to prove that libelant-respondent consented to stowage of the cargo on

deck without coverage by tarpaulins. On the contrary, both courts concurred in finding that the agreement provided for stowage on the foredeck covered by tarpaulins, that the goods were not covered by tarpaulins and that the stowage was negligent and the ship unseaworthy in respect thereto (R. 977).

The decision below, in the respect referred to, is in complete accord with the decision of this Court in *Compania de Navigacion La Flecha* v. *Brauer,* 168 U. S. 104, and is not in conflict with the earlier decisions in *Lawrence* v. *Minturn,* 17 How. 100, and *The Delaware,* 14 Wall. 579.

POINT II

The libelant-respondent was not in fault in requiring stowage on deck covered with tarpaulins; the fault was entirely that of petitioner in failing to provide tarpaulin coverage and in not stowing the pips on the hatch covers where they would have been above the water on deck, and there is no basis for application of the rule of divided damages in tort.

(Answering Petitioner's Point V, pp. 34-5.)

The point that libelant-respondent should be allowed only divided damages because it booked stowage on deck was raised below as well as the point that it had assumed all risk by booking such stowage (answered in Point I) and both points were overruled (R. 978). The rule of divided damages in admiralty only applies to torts (*The Max Morris,* 137 U. S. 1, 15) and not to contracts. It should not be extended to a contract of carriage between a shipper and a common carrier where the shipper has not been negligent. That the cause of action was one of cargo damage arising out of the breach of petitioner's contract with libelant-respondent properly to stow the pips on deck covered with tarpaulins is shown by the pleadings. (See

Articles Second to Seventh, inclusive, of the libel, Record 6-8, and especially Articles Fourth and Fifth, Tenth to Fifteenth, inclusive, and Twentieth and Twenty-first of petitioner's answer pleading the terms of the bill of lading, Record 11-16; see also Articles Fourth and Fifth, Tenth to Fifteenth, inclusive, Eighteenth, Twentieth and Twenty-first of claimant-respondent's answer, Record 18-24). Any allegations of negligence contained in the libel arise out of the failure of the petitioner to perform the obligations of its contract as a common carrier for hire. Moreover, the most seriously disputed issue of fact below was "whether libelant's original demand for the covering of the pips with tarpaulins" (R. 977) referred purely to the question of the terms of the contract between the petitioner and libelant-respondent. See *The St. Paul,* (S. D. N. Y.) 277 F. 99, where the Court held at page 109 that a libel in cargo damage sounds in contract and not in tort.

The cases cited by petitioner as authority for its position, *The Georgian,* 4 F. Supp. 718, affirmed 76 F. (2d) 550 (C. C. A. 5), and *Snow et al.* v. *Carruth et al.,* 22 Fed. Cas. 724, No. 13144, are not in point since in each of them the injury to the goods was attributed both to inherent vice upon shipment and to negligence in care and custody by the carrier. In the cause at bar the total injury was caused by negligent care and custody by petitioner and the ship. The District Court found that the pips were in good order and condition on delivery to the *S.S. Lafcomo* (Finding 16, R. 932) and became a total loss by sea water damage due to negligence of petitioner and unseaworthiness of the ship (Finding 54, Conclusions VI and VIII, R. 943-6), while the Circuit Court of Appeals concurred, saying:

> "Libellant was not in fault and there is no basis for the application of the rule of divided damages in tort. Respondent has not been able to prove what the damage would have been if proper stowage had been made. See *Schnell* v. *The Vallescura,* 293 U. S. 296, 307" (R. 978).

Schnell v. *The Vallescura,* supra, clearly overrules the doctrine for which *The Georgian,* supra, and *Snow* v. *Carruth,* supra, are cited by petitioner, for it holds that where cargo damage is found to be due both to sea peril and negligence in ventilation, the carrier is liable for the entire damage if it is unable to show what portion of the loss was due to sea peril for which it is not liable, as distinguished from negligence in ventilation, for which it is liable.

POINT III

The agreement of petitioner with libelant-respondent to stow the pips on the foredeck and cover them with tarpaulins was not merged in the bill of lading in which coverage by tarpaulins was not mentioned.

(Answering Petitioner's Point VI)

The District Court below found that the bill of lading (R. 878) was prepared by libelant-respondent's agents at Rotterdam except for the stamped clauses thereon and was signed by petitioner's Rotterdam agent, under date of November 26th (Finding 26, R. 934-5). There is nothing in the record to substantiate petitioner's statement (brief, p. 38) that it was prepared by libelant-respondent's agents "on Sunday, November 26th", after the loading permit was prepared, from which petitioner argues that it was a revocation of the "demand for tarpaulins" contained in such permit. There is no evidence concerning the time when the bill of lading, was prepared by libelant-respondent; petitioner's counsel's proposed finding, submitted to the District Judge as to such time, was disallowed.

It seems probable that the bill of lading was presented contemporaneously with the written shipping order or loading permit to petitioner's stevedores by libelant-respondent's agent at approximately 5:30 P. M. on November 25th,

when the pips were delivered to the ship. This written shipping order or loading permit contained words in the Dutch language which were translated as meaning "to be loaded on deck on the foredeck to be covered" and libelant-respondent's representative made out a so-called duplicate thereof at the stevedores' request which contained words in the Dutch language which were translated "these parcels loaded together on *Lafcomo* foredeck *under tarpaulins*" with the emphasized words underlined in blue (R. 635-6) and both documents were accepted by petitioner's stevedores without alteration or objection at the time (Finding 14, R. 931). It would be normal and usual practice for these documents to have been delivered contemporaneously with the bill of lading. That they were so delivered is indicated by the fact that the goods were loaded on ship on Sunday, November 26th; that libelant-respondent's forwarding agent telephoned the stevedores on that day to inquire if they were being loaded (Finding 22, R. 933), but that no representative of libelant-respondent was on board the *Lafcomo* during or after the stowage of the goods (Finding 32, R. 937). Had the bill of lading been delivered by libelant-respondent's representative on November 26th, why would he not have gone aboard the vessel at the time to see the stowage instead of telephoning to ascertain about the loading?

The District Court found that "the proper place for any such notation" [coverage by tarpaulins] "was on the loading permit" (Finding 26, R. 934-5).

The cases cited by petitioner are not in point. No other document besides the bill of lading was involved in *The Delaware*, 14 Wall. 579, while in *The Thames*, 14 Wall. 98, the question was whether the original bill of lading in the hands of the shipper or the ship's copy thereof controlled. The cause below did not involve any attempt to contradict or vary a written contract. There were two written documents, the loading permit or shipping order and the bill of lading. They did not contradict each other since both

provided for stowage on deck. They supplemented each other. The loading permit merely detailed the type of protection to be afforded the goods when so stowed, by tarpaulin coverage. The Courts below were right in reading the two documents together in determining the contract between the parties.

POINT IV

The evidence supports the findings of the courts below that petitioner agreed with libelant-respondent to cover the goods with tarpaulins.

(Answering Petitioner's Point VII, pp. 37-8.)

The District Court found that about midday on November 25, 1939, libelant-respondent's forwarding agents booked space on the foredeck of the vessel from petitioner's agents "giving instructions that the shipment should be covered with tarpaulins, and these instructions were never changed or countermanded" (Finding 12, R. 930-1); that on the afternoon of November 25th after so booking the space libelant-respondent's said agent prepared a written shipping order which provided that such shipment was to be loaded on the foredeck, to be covered, which document was delivered to petitioner's stevedores at about 5:30 P. M., with a duplicate made out at stevedores' request, at the time the goods were delivered and were received without question and without change (Finding 14, R. 931); that the ship had on board insufficient tarpaulins to cover the goods and that neither petitioner nor its Rotterdam agents had sufficient tarpaulins for the purpose and had such coverage been given would have been required to buy or rent them (Finding 18, R. 932-3); that after receiving the goods, with the shipping order or loading permit providing for coverage on deck, petitioner's stevedore telephoned petitioner's agents to inquire whether

he should order tarpaulins because the next day was Sunday, and was told by petitioner's agent it "was not necessary as they 'had not to be covered'" (Finding 19, R. 933); that on the evening of November 25th after the stevedores had received the goods with the aforesaid loading permit petitioner's Rotterdam agent instructed the stevedore foreman "not to cover the shipment with tarpaulins" (Finding 20, R. 933).

See also Opinion of District Court (R. 918-928, especially at fols. 2757-60 and fols. 2772-5).

The Circuit Court of Appeals concurred in the findings of the District Court, saying:

> "The district court, however, resolved the most seriously disputed issue of fact—whether libelant's original demand for the covering of the pips with tarpaulins were withdrawn—in favor of libelant, and found negligence in the stowage because the boxes of pips were not covered by tarpaulins and because they were placed in the wings of the hatches, rather than on the hatch covers, where they would have been above the water on deck and would have allowed the sea to drain off through freeing ports, moorings and scuppers. * * * The well reasoned opinion of Leibell, J., below, 49 F. Supp. 559, leaves little for us to add. There is ample evidence to sustain his findings" (977).

In view of the many cases holding that it is "the settled doctrine of this Court that concurrent decisions of the Courts below upon a question of fact will be followed unless shown to be clearly erroneous" (*Compania La Flecha* v. *Brauer,* 168 U. S. 1, and cases there cited: *Stuart* v. *Hayden,* 169 U. S. 114; *Baker* v. *Cummings,* 169 U. S. 189; *The Carib Prince,* 170 U. S. 655; *International Navigation Co.* v. *Farr & Bailey Manufacturing Co.,* 181 U. S. 218; *The Wildcroft,* 201 U. S. 378) and as petitioner has not pointed out any clear error it seems unnecessary for me to go further and cite testimony to sustain the findings below. *Electric Storage Battery Co.* v. *Shimadzu,* 307 U. S. 5, cited by petitioner as holding to the contrary

(p. 37) in fact is to the same effect for the report states at page 9, "No controversy of fact is involved as the petitioner concedes it must accept the concurrent findings of the Courts below."

It may also be observed that the following undisputed facts made the concurrent findings almost inevitable. Petitioner admitted that libelant-respondent's forwarding agent originally orally reserved space for the goods "to be stowed on deck of the *S.S. Lafcomo* on the foreship covered by tarpaulins * * * " (R 693-4) but claims it later countermanded the instructions for tarpaulin coverage. Libelant-respondent's agent denied that he countermanded such instructions (R. 623) and his testimony was corroborated by the written shipping order or loading permit, expressly providing for such coverage, which was prepared under his direction two or three hours after the conversation with petitioner's representative (Ex. 1, R. 722; Ex. A, R. 896). This document was delivered by hand to petitioner's stevedores with other cargo documents along with the pips in the late afternoon of November 25th (R. 735, 750) and was accepted by them without question, objection or alteration and in fact they requested the bearer thereof to make out a duplicate, which he did, on which he underlined in blue pencil the words "under tarpaulins" (R. 635-6); that these documents were turned over by petitioner's stevedores to petitioner's Rotterdam agents two days after the vessel sailed (R. 705) and were never questioned until after the suit herein was brought. No protest was ever made by petitioner's stevedores or agents after receiving this written shipping order or loading permit. It is inconceivable that, if petitioner's story of the alleged countermanding of the instructions for tarpaulin coverage were true, it would have accepted the loading permit and allowed it to remain unchallenged, without even writing a letter to respondent's agent or making a notation on the document to evidence the alleged countermanding.

POINT V

The evidence supports the findings below that the stowage was negligent and was the proximate cause of the loss and the case falls within the rule of *Schnell* v. *The Vallescura.*

(Answering Petitioner's Point VIII, pp. 39-40.)

All except one of the experts on stowage for all parties to the cause testified in open Court. The facts as to the actual stowage are undisputed. The District Court made the following findings as to stowage:

The pips were stowed on the forward well deck on the deck plates on both sides of No. 1 and 2 hatches and were not covered with tarpaulins (Findings 24, 25, R. 934); No. 1 hatch was 27 feet long and 24 feet wide and No. 2 hatch 31 feet long and 24 feet wide and their coamings were about 3 feet high (Finding 27, R. 935-6); the bulwarks which were 3½ feet high on each side of the forward well deck were provided with the following openings for drainage of water: 2 oval mooring rings each 15 inches long and 7 inches high, the bottom of each being 15 inches above the deck plate, 4 oval freeing ports each 3 feet long and 20 inches high, the bottom of each being 14 inches above the deck plates, 3 scuppers each 6 inches long and 2½ inches high and 2 scuppers 6 inches long and 4 inches high, the bottom of each scupper being about ½ inch above the deck plates and 2 vertical scuppers near the after corners of the forward well deck having a diameter of 1½-2 inches (Finding 28, R. 936); that the cases of pips so stowed blocked off and obstructed two of the four freeing ports, both of the mooring rings and part of the scuppers in each bulwark which resulted in the lower tiers of the stow being submerged in sea water for considerable periods during the voyage (Finding 30, R. 936-7); that the vessel met such weather as was to be expected on her voyage from Rotterdam to

New York with much water coming aboard on the forward well deck (Finding 33, R. 937-8); that the pips could have all been stowed on top of Nos. 1 and 2 hatches in piles 6½ to 6¾ feet high without danger to the ship's stability, covered with three tarpaulins to each hatch and lashed so that the cases would have been free from submersion by the water flooding the foredeck plating and the contents protected from damage (Finding 35, R. 938); that vegetable and plant cargoes are customarily stowed on the tops of hatches and not on deck plates when carried on the foredeck (Finding 36, R. 938); that the pips were dormant when shipped and would not have heated or sprouted if covered with tarpaulins on the voyage (Finding 37, R. 938-9); that the pips upon arrival at New York were a total loss and such loss was caused by sea water damage (Finding 54, R. 943); that the stowage of the pips on the vessel constituted negligence and the ship was unseaworthy with respect thereto (Conclusions VI and VII, R. 945); that the competent producing cause of the damage to the pips by sea water was the failure to stow them on top of Nos. 1 and 2 hatches covered by tarpaulins (Conclusion VIII, R. 945-6).

The Circuit Court of Appeals concurred in these findings as I have heretofore shown at page 13.

There was ample evidence to support these findings. The testimony of the experts, Captain Lynner and Captain Claridge, fully supported the finding that stowage on the deck plates was not customary or in accordance with good practice and that the cargo could have been stowed on the hatch covers where it would have been adequately protected (Lynner, R. 235-6, 239-40, 253-4, 258-60, 267-72, 274, 528, 538; Claridge, R. 828-9, 843-4, 865-6).

Petitioner's expert witnesses recognized the fact that the cargo would get very wet stowed on the foredeck plating (R. 387, 393-8, 443-4, 453, 455, 471). Petitioner's only objection to stowage on the hatch covers was because of alleged difficulty in lashing the tarpaulins, but admitted that this could have been done (R. 349, 380, 382) and that

unless the tarpaulins became torn the cargo would have been protected (R. 354, 388-9). Captain Pilcher, one of the petitioner's experts, admitted that, with tarpaulins arranged as Captain Lynner advised, the cargo would be protected from any seas coming from forward or from any direction except abaft the beam.

Captain Cocks, petitioner's expert, conceded upon questioning by the Court that if the cargo had been stowed on the hatches instead of on the deck plates the water would have run off much more easily and the cargo would have been above the water. I quote from his testimony as follows:

> "Q. How high is the hatch cover above the deck? A. Three feet.
>
> Q. And how high is the freeing port, the lower part of it? A. About 15 inches.
>
> Q. Now if the cargo was stowed on the hatch top, then a heavy wave or any great quantity of water on the deck would reach the height of the freeing port before it reached the height of the hatch cover, wouldn't it? A. Yes, sir.
>
> Q. And if the cargo was stowed on the hatch cover you would have the whole side—you would have both sides of the well-deck free for the runoff of the water through the mooring rings, through the freeing ports and through the scuppers, isn't that right? A. Yes, sir.
>
> Q. And it would make a clear, wide and satisfactory passage or runoff for the water, wouldn't it? A. It would be to the open deck.
>
> Q. An open deck on either side? A. Yes, sir.
>
> Q. And wouldn't the water under those conditions run off and be returned to the ocean much more readily and rapidly than with the cargo stowed as it was as shown on the model? A. Yes, sir" (R. 398-9).

The finding that the pips were dormant, did not need ventilation and would not have sprouted if covered by tarpaulins was based upon the testimony of Dr. Zimmerman, distinguished plant physiologist of the Boyce Thompson

Institute (R. 220, 222-3). The instances of sprouting testified to by petitioner's witnesses were all of pips carried unrefrigerated under deck, not on deck (R. 476, 503, 510).

The findings that plant and vegetable cargo is customarily carried stowed on hatch covers covered with tarpaulins were based on numerous instances testified to by Captain Lynner and Captain Claridge, the former of whom produced records of eighteen survey reports from his office showing such stowage coming through heavy weather around Hatteras without damage (R. 234-9, 528-36, 550-1). Lynner testified that in not more than one trip in 500 is a tarpaulin torn away by the seas (R. 539).

The findings are clearly supported by the evidence.

Schnell v. *The Vallescura*, 293 U. S. 296, clearly applies, as I have shown supra, page 10. The Carriage of Goods by Sea Act, 46 U. S. C. 1300, does not apply to deck cargo which is governed by the Harter Act, 46 U. S. C. 190-5, under which *Schnell* v. *The Vallescura* was decided.

POINT VI

The questions presented are not of general interest and unusual importance. The cause is merely an ordinary cargo damage suit such as is met with almost daily in the district courts and was decided below in accordance with well-established principles of admiralty law. It has no unusual importance except in the eyes of petitioner's counsel.

FINAL POINT

The petition for writ of certiorari should be denied.

January 22, 1944.

Respectfully submitted,

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On the Brief.